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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re LILIAN F., a Person Coming Under the
Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

KELLY H.,

Defendant and Appellant.

F070665

(Super. Ct. No. JD127359-01)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Louie L. Vega,
Judge.

Susan M. O'Brien, under appointment by the Court of Appeal, for Defendant and
Appellant.

Theresa A. Goldner, County Counsel, and Elizabeth M. Giesick, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J. and Smith, J.

Kelly H. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her daughter Lilian F.¹ Mother contends the juvenile court's determination that the beneficial relationship exception does not apply is an abuse of discretion.

We disagree and affirm the court's order.

FACTS AND PROCEDURAL HISTORY

Background

Lilian was born in 2007 in Florida. Mother used cocaine and drank during the pregnancy. Mother and Lilian's father were not married, and he died in 2011.

Lilian first came to the attention of the Kern County Department of Human Services (the Department) in July 2011, when the Department received a referral reporting that mother had a history of using drugs.

A social worker visited mother's home in Bakersfield and met with mother and her roommate, Jennifer.² Mother admitted she had issues with heroin and cocaine and said she tended to be codependent and had an addictive personality. She also reported she had been diagnosed as bipolar and, when she does not take her medications, she abuses substances. Jennifer told the social worker that mother and Lilian could live with her as long as mother followed the rules, which were "no alcohol, no substance abuse, and to take care of [Lilian]." Jennifer had been friends with mother for over 10 years, and she was Lilian's godmother.

The Department received Child Protective Services (CPS) records for mother and Lilian from other jurisdictions. Mother was homeless and living in a crack house when she gave birth to Lilian. In May 2009, Sacramento County received a referral alleging

¹ All further statutory references are to the Welfare and Institutions Code.

² Jennifer changed her last name when she married in 2013. For clarity, we refer to her by her first name only.

general neglect based on mother's drug and alcohol problem. Lilian, then under two years old, was removed from mother's custody, and mother was ordered to take a parenting class and attend substance abuse and mental health counseling. Lilian was placed with Jennifer.³ Mother completed a residential treatment program and regained custody of Lilian by July 2010. In January 2011, Sacramento County received another referral alleging general neglect after mother was arrested for grand theft and burglary. Mother was assigned to voluntary family maintenance services in Sacramento County, but she and Lilian then moved to Florida to live with mother's aunt. They soon returned to California, as Sacramento County received a referral of caretaker absence after mother was arrested for shoplifting in May 2011. At that time, mother and Lilian were living in a motel with a known heroin addict. In July 2011, Palm Beach County, Florida, received a referral reporting that mother was drinking excessively and taking other people's Vicodin.

First juvenile dependency petition in Kern County

In September 2011, the Department filed a juvenile dependency petition alleging mother had failed to protect Lilian because of mother's ongoing substance abuse and alcohol use. (§ 300, subd. (b).) Lilian, who was four years old at the time, was detained from her mother. In November 2011, the court found the allegation of failure to protect true, and Lilian was removed from mother. Lilian was placed with Jennifer.

In May 2012, the court found mother had made substantial progress toward alleviating the causes for removal and returned Lilian to mother's care. In March 2013, mother was awarded sole legal and physical custody of Lilian and jurisdiction was terminated.

³ Before the Sacramento proceeding, mother and Lilian had been living with Jennifer since late October 2008.

Second juvenile dependency petition

In March 2014, the Department filed a second juvenile dependency petition, alleging there was a substantial risk that Lilian would suffer serious physical harm or illness because of mother's substance abuse. (§ 300, subd. (b).) Mother had tested positive for amphetamine and methamphetamine twice in the month of March, and mother admitted to taking methamphetamine on two occasions. It was also alleged that mother was not receiving regular mental health treatment and she described herself as feeling “not normal” and unstable. Mother submitted the petition on the basis of the social worker's reports. Lilian, who was six years old at the time, was again placed with Jennifer, who now lived in Placer County.

In May 2014, at the dispositional hearing, the court adjudged Lilian a dependent of the court and determined that family reunification services were not to be provided pursuant to section 361.5, subdivision (b)(13).⁴ Jennifer was appointed to make educational decisions for Lilian, and mother was allowed supervised, four-hour visits on a monthly basis and continued telephone contact with Lilian. The court set a permanency planning hearing (§ 366.26) for September 2014. Mother's attorney asked the court to appoint a psychologist to conduct an evaluation of the mother-child relationship. The court declined to do so, stating that the social study would “cover that area” and a psychologist's report on the issue was not necessary.

Social studies

In a social study prepared for the section 366.26 hearing, the Department wrote that Lilian was a bright and playful seven-year-old with no major medical or

⁴ Reunification services need not be provided when the court finds by clear and convincing evidence “[t]hat the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.” (§ 361.5, subd. (b)(13).)

developmental problems. It determined that she was a generally adoptable child. Her current caretaker, Jennifer, was committed to adopting Lilian, and if Jennifer were unable to adopt, there were also five out-of-state relative applications for adoption.

The Department found, “Lilian currently looks to her caretaker for her emotional and physical needs.” Lilian had been placed with Jennifer on two previous occasions, from May 12 to November 9, 2009, and from October 4, 2011 to May 30, 2012. Jennifer had known Lilian since she was a baby and she had helped take care of Lilian throughout her life. She also reported that Lilian did not ask about or talk about her mother unless someone brought up the subject.

In July 2014, during a private interview conducted by an adoption social worker, Lilian stated that she liked living with Jennifer. Asked where she would live if she could live anywhere in the world, Lilian first responded New York because she wanted to see the Statue of Liberty and then said Disneyland so she could live with the princesses. Asked who she would want to live with at Disneyland, she responded Jennifer and then added she wanted ““Mommy,”” ““Grandpa,”” and ““Grandma,”” to live with her. (Grandpa and grandma referred to Jennifer’s parents.) Finally, Lilian said she wanted ““everyone who is family,”” to live with her at Disneyland.

The Department reported that the majority of Lilian’s contacts with mother were of good quality and, between March 26 and September 9, 2014, mother had attended five of five scheduled visits with the child. At a visit in May, Lilian gave mother a gift she made at school, a card, and a pin that read, ““I love Mom.”” Lilian was excited as mother unwrapped the gift, which was a painting. Mother hugged Lilian and told her she loved her. The social worker supervising the visit observed Lilian “to be completely comfortable bouncing between” mother, Jennifer, and Jennifer’s mother, whom Lilian called ““grandma.”” In June 2014, Jennifer supervised a visit between mother and Lilian. She reported that mother engaged Lilian in positive, age-appropriate play and used appropriate methods of discipline. Mother readily showed affection throughout the visit

and cried at the end of the visit. However, she also made false promises, telling Lilian that she was moving to Sacramento to see Lilian more often when mother had made no preparations to move and additional visitation had not been approved by the court. At a visit in July 2014, Lilian ran to greet and hug mother and called out, ““Mom.”” Mother was attentive and affectionate with Lilian and Lilian was also affectionate with mother. Lilian played ““Monkey in the Middle”” with mother and Jennifer, whom she called ““Auntie Jen.”” Mother also had regular phone calls with Lilian, which were of good quality according to Jennifer.

The Department concluded: “While the child may have some short term adjustment issues from losing contact with her mother, any detriment would be offset by the benefits of a permanent adoptive home. Therefore, it is the opinion of the undersigned that it would not be detrimental to the child to terminate parental rights so the child may have a permanent adoptive home.”

In a supplemental social study, the Department described a supervised visit that occurred in September 2014. Lilian appeared to be happy when she saw mother and greeted her with a hug and kiss. Mother reported to the social worker that Lilian said Jennifer told her to say she wanted to live with only ““Auntie,”” referring to Jennifer. Mother asked Lilian to repeat herself so the social worker could hear, and Lilian said she did not know what to say because she wanted to live with both her caretaker and her mother or to continue visits with mother.⁵ Later during the visit, the social worker spoke with Jennifer alone. Jennifer denied ever telling Lilian to say she only wanted to live with her. Jennifer said Lilian had told her she wanted to live with her forever and said she wished “she had come from caretaker’s ‘belly.’” In the supplemental social study, the Department continued to recommend termination of parental rights because it was in the best interest of the child to be freed for adoption.

⁵ Jennifer previously reported that, during a visit in June 2014, Lilian said, ““Mommy told me if the people (CPS) ask me, to tell them I want to live with her.””

Section 366.26 hearing

Lilian, mother, Jennifer, and adoption social worker Isabel Liu testified at the permanency planning hearing.

Lilian, who was seven years old at the time, testified outside the presence of mother and Jennifer. She liked living with Jennifer, especially because they had a lake and she could ride her pony on trail rides. She did not want to leave Jennifer's house. Lilian had fun during her visits with mother. She wanted to continue seeing mother and wanted to see her more often. Mother's attorney asked how she would feel if she never got to see or talk to her mother again, and Lilian responded, "Sad." The attorney asked, "Would it make your heart ache if you didn't get to see [mother]?" Lilian responded yes. Asked if it would "leave a big hole there that couldn't be filled," she nodded yes.

Lilian also said she wanted to live with mother some day when mother could take care of her. She agreed that Jennifer had "been acting as [her] mom a whole bunch of [her] life." Mother had a special place in Lilian's heart, and Jennifer would not be able to "fill a lot of that hole in [her] heart." Lilian testified she wanted to see her mother more because she loves her and, "if I didn't get to see her, I would be upset."

Jennifer testified that she became Lilian's godmother when Lilian was nine months old. Jennifer cared for Lilian even when CPS was not involved. For example, mother left Lilian with Jennifer for the summer of 2013. Lilian did not usually cry after visits with mother. When she was at Jennifer's house, Lilian would never cry for or ask for her mother. Jennifer believed adoption rather than a guardianship would be best for Lilian because "she needs stability and permanency" and "she's been going back and forth all her life, and I don't think that's fair to put a child through that."

Adoption social worker Liu observed two visits between Lilian and mother and reviewed documentation of previous visits. She recommended a permanent plan of adoption for Lilian. Liu took into consideration Lilian's relationship with Jennifer, who appeared to take a more parental role than mother. On one occasion, Lilian was upset

and she went to Jennifer for comfort although mother was also present. Liu also considered Lilian's CPS history and the fact that she had been taken into protective custody on three separate occasions. On cross-examination by mother's attorney, Liu agreed she had only observed mother's interactions with Lilian for a total of four and one-half hours.

Mother testified that, during times she and Lilian lived with Jennifer, Jennifer tried to take over her role as parent "[a] lot of times." She testified that Jennifer was always present during her supervised visits with Lilian except for a two-hour period during one visit. Mother expressed her concern to Liu about assessing the parent-child relationship with Jennifer present. At the end of visits, sometimes Lilian was whiny, sometimes she was clingy, and sometimes she would cry. Mother also testified that, "a long time ago," she and Jennifer almost had "a two-mom relationship" with Lilian, where, "whatever [Lilian] needed, whoever took care of it took care of it."

Mother's attorney urged the court to apply the exception for beneficial parent-child relationship (§ 366.26, subd. (c)(1)(B)(i)) to avoid termination of parental rights. He argued that Lilian's testimony demonstrated termination of mother's parental rights would be detrimental. He pointed out that Lilian thinks of Jennifer as "Aunt Jennifer" and still "thinks of her mother as her mother."

The attorney for Lilian told the court it had "a very, very difficult choice to make in this case" and did not offer a recommendation. Instead, she observed: "[Lilian] could easily live with either person [mother or Jennifer] and feel, I think, loved. The issue is the stability and the security that she would receive in a stable adoptive home, does that overcome the hole in the heart that she would suffer if you terminated parental rights? I can't answer that." Lilian's attorney believed the absence of her mother in Lilian's life is "detrimental harm," but she also felt that Lilian was "safer, more stable and should always live with Jennifer."

The Department's attorney agreed this was a difficult case and there was an emotional bond between mother and child, but argued mother had not met her burden of proving the exception. She stated that Lilian has "been going through this since 2009" and "she's entitled to a safe and stable and permanent home."

After hearing the evidence and arguments, the court found no dispute that Lilian was adoptable and, further, there was no question that mother had maintained regular visitation and contact with her.

The only issue was "whether there is an existence of a relationship that constitutes a compelling reason for determining that termination would be detrimental to [Lilian] in this case." On that issue, the court found:

"Obviously there is some detriment if the court terminates the parental relationship. But there's an overriding benefit to the child under the circumstances presented here. There's been reference made to the child to the effects of words, 'have a hole in her heart.' Those weren't her words. Those were the words proffered by the counsel asking her. She may have adopted them perhaps. But I think the record will speak for itself on that point. I do see a young child ... who would benefit greatly from a permanent home, a stable home, a loving home. And she's been with the person that has the best prospect for that for several years. And whether she uses the term 'mommy' or 'auntie,' the effect is the same. That is who she is comfortable with and that's who would serve her best interests."

The court ordered mother's parental rights terminated, declared Lilian free from parental care and control, and referred Lilian to the county adoption agency for adoptive placement.

DISCUSSION

The purpose of a section 366.26 hearing is to select and implement a permanent plan for the dependent child. (*In re S.B.* (2009) 46 Cal.4th 529, 532.) The Legislature's preferred permanent plan is adoption. (§ 366.26, subd. (b)(1); *In re D.M.* (2012) 205 Cal.App.4th 283, 290.) "At a section 366.26 hearing, the court *must* terminate parental rights and free the child for adoption if [1] it determines by clear and convincing

evidence the child is adoptable within a reasonable time, and [2] the parents have not shown that termination of parental rights would be detrimental to the child under any of the statutory exceptions to adoption found in section 366.26, subdivision (c)(1)(B)(i) through (vi). (§ 366.26, subd. (c)(1).)” (*In re D.M.*, *supra*, at p. 290, italics added.)

In this case, mother does not dispute that Lilian is adoptable but contends the statutory exception for a beneficial parent-child relationship applies. (§ 366.26, subd. (c)(1)(B)(i).) This statutory exception requires a showing of “a compelling reason for determining that termination would be detrimental to the child” due to the circumstance that “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (*Ibid.*) It is the parent’s burden to prove the exception applies. (*In re Autumn H.*, (1994) 27 Cal.App.4th 567, 574 (*Autumn H.*).)

Generally, the abuse of discretion standard governs our review of a juvenile court’s determination of the applicability of a statutory exception to termination of parental rights, but the substantial evidence test applies to pure findings of fact. (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.) This means we review the court’s findings of fact for substantial evidence and its conclusions of law de novo, and we reverse its application of law to the facts only if it is arbitrary and capricious. (*Ibid.*)⁶

Mother contends the juvenile court abused its discretion by ruling that the beneficial parent-child relationship exception does not apply. Where, as here, the appellant had the burden of proof at trial, “the question for a reviewing court [is] whether

⁶ The Department argues the substantial-evidence standard of review, not abuse of discretion, applies. We note, however, “[t]he practical differences between the two standards of review are not significant. ‘[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling.... Broad deference must be shown to the trial judge. The reviewing court should interfere only “if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he did.’ ...” [Citations.]” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

the evidence compels a finding in favor of the appellant as a matter of law.” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) “Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached,’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’” (*Ibid.*)

In *Autumn H.*, the Court of Appeal explained, “[W]e interpret the ‘benefit from continuing the [parent/child] relationship’ exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) “In other words, the [juvenile] court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Ibid.*)

A parent must show more than frequent and loving contact or pleasant visits. (See *In re C.F.* (2011) 193 Cal.App.4th 549, 555; *In re C.B., supra*, 190 Cal.App.4th at p. 126; *In re I.W., supra*, 180 Cal.App.4th at p. 1527.) “The parent must show he or she occupies a parental role in the child’s life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the section 366.26, subdivision (c)(1)(B)(i) exception[,] the parent must show the child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]” (*In re C.F., supra* at p. 555.)

Here, Lilian was removed from mother when she was one year old, again when she was four years old, and most recently when she was six years old. While mother was able to complete required classes and stop abusing drugs and alcohol long enough to regain custody of Lilian on two occasions, it did not appear she was ever able to maintain

a stable, sober life for more than a year at time. The record shows mother and Lilian moved between California and Florida repeatedly and mother apparently moved from using crack cocaine to heroin to amphetamines over the course of Lilian's young life. Jennifer, mother, and Lilian all agreed Jennifer had taken a parental role in Lilian's life from the time she was very young. Lilian testified that Jennifer had acted "as [her] mom a whole bunch of [her] life." Mother testified she and Jennifer almost had a "two-mom relationship" with Lilian. Lilian's representative believed Lilian was safer and more stable with Jennifer and she "should always live with Jennifer." It was clear to the juvenile court there would be some detriment to Lilian by the termination of mother's parental rights, but the court determined that this detriment was outweighed by the benefit to Lilian of a permanent, stable, and loving home with an adoptive parent. Under the circumstances of the case, we cannot say this determination was an abuse of discretion.

Mother relies on *In re Scott B.* (2010) 188 Cal.App.4th 452 (*Scott B.*), but the circumstances of that case are distinguishable. In *Scott B.*, the minor was nine years old when he was placed in foster care and 11 years old when his mother's parental rights were terminated. (*Id.* at p. 471.) He needed special education services, he had a diagnosis of autism that was substantially disabling, and he had behavioral problems and problems interacting with his peers. (*Id.* at pp. 455–456.) He stated that if his foster parent adopted him, he would run away because he wanted to live with his mother. (*Id.* at p. 466.) On the record in that case, the Court of Appeal concluded:

"Given Scott's strong emotional attachment to Mother, his continued precarious emotional state, and his history of regressing and running away when he is stressed, there is a very good chance that he will have a meltdown if his usual frequent visitation with Mother does not continue. The only way to avoid that serious emotional and developmental setback and ensure that Scott's usual visitation with Mother continues is by court order. The only way to have such an order is to have Scott's permanent

plan be legal guardianship or long-term foster care.” (*Scott B.*, *supra*, 188 Cal.App.4th 452, 472.)

There is no similar evidence that Lilian is in a precarious emotional state or that not seeing mother will cause her a serious emotional or developmental setback. Rather, the evidence shows that Lilian is developmentally on track and she does not have behavioral problems. She was younger than *Scott B.* when she was removed from mother, and she had lived with Jennifer and away from mother for many months on two prior occasions. Further, while living with Jennifer most recently, Lilian had not asked about or talked about her mother unless someone brought up the subject. In short, the evidence in the present case does not *compel* a determination that the mother-child “relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; see *In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

DISPOSITION

The juvenile court’s order is affirmed.